Supreme Court, U.S.
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Supreme Court No.

UNITED STATES SUPREME COURT

1995 Term

RICKY A. WHITE,

Petitioner,

vs.

CITY OF TAYLOR, R. HARMON, R. CLEWETT, and OFFICER BLANCHARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM AN OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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63 pp

QUESTION PRESENTED

Whether, in light of this Court's decision in Johnson v. Jones, 115 S.Ct. 2151 (1995), the Sixth Circuit Court of Appeals had jurisdiction to hear an immediate appeal of the trial court's order denying summary judgment on the respondents' Rule 56(c) motion where respondents raised the issue of qualified immunity and where the trial court found that the record sufficiently supported genuine issues of material fact which precluded summary judgment.

PARTIES

The petitioner is the plaintiff in a 42 USC § 1983 action against the respondents alleging the use of excessive force during the course of an arrest.

The respondents, R. Harmon, R. Clewett and Officer Blanchard are each police officers for the Defendant City of Taylor. The City of Taylor was not a party to the appeal in the Court of Appeals.[1]

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[1] See Sixth Circuit Order, 8/31/95, Appendix p. A-2.

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REFERENCE TO OPINIONS

1. Sixth Circuit Court of Appeals Opinion, No. 94-1456, August 31, 1995 (Contie, Ryan, and Suhrheinrich, Circuit Judges). **THIS IS THE ORDER THAT PETITIONER SEEKS TO APPEAL.**

2. U.S. District Court (E.D. Mich) Opinion and Order Denying Defendants' Motion for Summary Judgment, No. 93-17933, April 14, 1994, (Judge Paul V. Gadola).

JURISDICTION

On August 31, 1995 the Sixth Circuit Court of Appeals filed its opinion in the instant case reversing, in part, the trial court's denial of summary judgment as to two of the police officer respondents. Petitioner seeks to appeal this order.

The Jurisdiction of the Supreme Court is based upon 28 USC § 1254(1) which provides that the Supreme Court may review cases in the Court of Appeals "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTES INVOLVED IN THE CASE

28 USC § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

FEDERAL RULE OF CIVIL PROCEDURE 56(c)

The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

This case was originally brought in Wayne County Circuit Court, State of Michigan, alleging, *inter alia*, violation of the United States Constitution's 4th Amendment and 42 USC § 1983 based upon the use of excessive force by the defendant officers during the course of an arrest.[2] The case was removed by the defendants to the United States District Court, Eastern District of Michigan under 28 USC § 1441, invoking the court's federal question jurisdiction of 28 USC § 1331. Federal jurisdiction was not disputed.

On December 6, 1993, all defendants moved for summary judgment pursuant to

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[2] It is undisputed that petitioner was attacked and severely injured by a police dog on a leash after petitioner had been arrested and handcuffed.

Rule 56(c) of the Federal Rules of Civil procedure raising the issue of qualified immunity. Plaintiff filed a response and defendants filed a further reply.

On April 14, 1994 the trial court filed a written opinion and order denying the defendants' motion for summary judgment. The opinion of the district court held,

> For the foregoing reasons, the court finds that the reasonableness of the officers' actions in waiting for the dog to find plaintiff after plaintiff had already been arrested and subdued is a genuine issue of material fact that precludes summary judgment.

See Appendix p. A-35.

The individual respondents filed an application for leave to appeal the trial court's denial of their motion in the Sixth Circuit Court of Appeals on the grounds that the trial court's denial of

a motion for summary judgment where qualified immunity had been raised was immediately appealable. The Sixth Circuit granted leave.

During the pendency of the appeal, the Supreme Court decided the case of Johnson v. Jones, 115 S.Ct. 2151 (1995).

In Johnson, upon underlying facts similar to those in the case at bar, this court held,

> For these reasons, we hold that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.

Johnson v. Jones, 115 S. Ct, at 2159. It was precisely upon the existence of a genuine issue of material fact supported by the record that the trial court here denied the defendants' summary judgment

motion. Pursuant to Johnson the district court's order was not immediately appealable.

Prior to oral argument the Sixth Circuit requested that the parties be prepared at oral argument to address the effect, if any, of the Johnson v. Jones decision upon respondents' appeal. See Appendix p. A-42. At oral argument, petitioner argued that Johnson was on point and virtually identical in the question presented, and that, as a result, the district court's order in the instant case was not immediately appealable and was therefore not within the jurisdiction of the court of appeals.

Notwithstanding the Supreme Court's ruling in Johnson, the Sixth Circuit exercised jurisdiction over the case and

issued an order reversing the trial court's denial of summary judgment as to two of the respondents and precisely attacking the trial court's factual determination that the record contained sufficient support for finding a genuine issue of material fact.[3] The court of appeals clearly disregarded the trial court's weighing of the evidence submitted and argued during the trial court proceedings. The appellate court then speculated wildly as to the subjective intent and the knowledge of defendants Harmon and Blanchard, and based upon that speculation reversed the

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[3] The Court of Appeals reversed the trial court's denial of summary judgment as to respondents Harmon and Blanchard and affirmed as to Respondent Clewett on the grounds of qualified immunity. The court declined to address the respondents other arguments as not appealable since they were not final orders. See Appendix p. A-14.

trial court's denial of summary judgment as to those two defendants. See Appendix p. A-12.

In declining to exercise jurisdiction over that portion of the defendant's appeal based upon collateral estoppel, the court of appeals order makes a specific finding that the district court's order in that regard is not immediately appealable. The court of appeals' opinion specifically cites to Johnson in that regard. See Appendix p. A-13. However, the court's decision with regard to the non-appealability of the denial of defendants' rule 56(c) motion for summary judgment raising the immunity issue conflicts directly with the decision of the Supreme Court in Johnson. The issue of the non-appealability of such decisions was the gravamen of the

Johnson case.

It is worthy of note that in the Johnson opinion, the Supreme Court carefully pointed out the conflict in the circuit courts of appeals on the issues of appellate jurisdiction and the immediate appealability of the kinds of orders at issue here. The position of every circuit, except the Sixth and Eleventh circuits, are referenced in the opinion. Johnson, 115 S.Ct. at 2154. Petitioner must conclude that the Sixth Circuit has not previously ruled upon the issues here presented since the Supreme Court makes no reference to a position of the Sixth Circuit in what is otherwise a fairly complete mapping of the courts of appeals on this issue.

The Sixth Circuit brought this issue squarely before it for consideration by

requesting that the parties address the effect upon the instant appeal of the Johnson decision. See Appendix p. A-42. Notwithstanding the Johnson decision the court assumed jurisdiction and then promptly ruled in a manner that was diametrically opposed to the Supreme Court's ruling. The Sixth Circuit either missed the point or ignored the point of the Supreme Court's ruling in Johnson.

This court should grant certiorari to correct the Sixth Circuit's non-conforming decision on the issue of the immediate appealability of denials of rule 56(c) summary judgment motions involving qualified immunity defenses.

AMPLIFICATION OF ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

Rule 10.1(c) of the Supreme Court Rules, Consideration Governing Review on

Writ of Certiorari, provides guidance on the type of controversy the court will consider when deciding whether to grant certiorari. Rule 10.1(c) counsels that the Supreme Court will consider granting a writ of certiorari,

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

In the instant case the decision of the Sixth Circuit Court of Appeals is in direct conflict with a decision of the Supreme Court on the issue of the immediate appealability of certain denials of summary judgment under Rule 56(c) where immunity has been raised by the defendants. The Sixth Circuit opinion is also in conflict with the

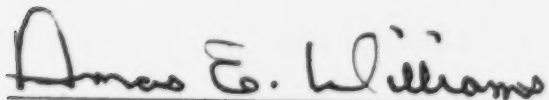
Supreme Court's decision on the closely related and equally significant issue relating to the jurisdiction of the appellate courts to hear such interlocutory appeals.

The issue of jurisdiction of the court of appeals is one of immense significance standing alone. However, when coupled with the issue of the immediate appealability of Rule 56 summary judgment denials involving the defense of qualified immunity the problem reaches far greater proportions because of the shear number of such appeals. It is reasonable to assume that in virtually every case alleging public official misconduct, the defense of immunity will be raised by the defendants and a motion for summary judgment will be filed as a matter of course.

The Sixth Circuit Court of Appeals was without jurisdiction to hear the appeal in this case because, based upon the Supreme Court's decision in Johnson, the order appealed from was not an immediately appealable order.

This court should grant certiorari to insure that the United States Court of Appeals for the Sixth Circuit conforms to the clear dictates of the Supreme Court's decision in Johnson v. Jones.

RESPECTFULLY SUBMITTED,
AMOS E. WILLIAMS, P.C.



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Dated: November 22, 1995

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No. 94-1456

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY A. WHITE,

Plaintiff-Appellee,

v.
RONALD HARMON; RONALD CLEWETT;
District of Michigan.
and KEITH BLANCHARD,

Defendants-Appellants.
_____/

BEFORE: CONTIE, RYAN, and SUHRHEINRICH, Circuit Judges

RYAN, Circuit Judge. The plaintiff, Ricky White, brought this 42 U.S.C. § 1983 action against the defendants and the City of Taylor, alleging that the individual defendants used excessive force in arresting him and that the City of Taylor's failure to train the officers resulted in their use of excessive force. The district court entered summary judgment for all

defendants.

The individual defendants appeal from the district court's denial of their motions for summary judgment on the basis of qualified immunity and on the basis of collateral estoppel or issue preclusion. Although the briefs are written as though the City of Taylor were an appellant, no claim of appeal was filed by the City of Taylor in this case. The City's petition for leave to appeal, filed separately, was denied by this court in an order entered June 21, 1995.

We affirm the denial of summary judgment on qualified immunity as to Officer Clewett; reverse the denial of summary judgment on qualified immunity as to Officers [2] Harmon and Blanchard; and decline to exercise appellate jurisdiction over the defendants' appeal

of the denial of summary judgment on the basis of collateral estoppel or issue preclusion.

I.

In the early morning hours of April 30, 1991, Officers Mize and Blanchard of the Taylor police force were investigating two abandoned automobiles believed to be stolen. During the inspection, the officers noticed two other cars approaching on the road. The approach was suspicious--the two cars alternately started and stopped, started and stopped. The officers already suspected that the location was a drop-off point for stolen vehicles, so Mize and Blanchard followed the two cars.

Blanchard pulled over the car being driven by Isaac Rickles, determined that Rickles was driving with a suspended

license, and arrested him. Mize followed the plaintiff, Ricky White, into a driveway. White exited the car he had been driving and knocked on the door of the house nearby. He then went around the side of the house, jumped over a fence, and fled. Mize observed that the engine of the car White had driven was running without keys in the ignition and that the steering column was damaged. Mize radioed for assistance.

Officer Harmon responded to the request for assistance. Harmon spotted White running and unsuccessfully ordered White to stop. Eventually, Harmon found the plaintiff in a field, tackled him to the ground, and handcuffed him. Blanchard arrived on the scene, and the two officers began to drag White to the police car. After dragging White about

fifty yards, they contacted Officer Clewett, the canine handler, by radio to inform him that the suspect had been apprehended. According to Harmon, Clewett "told" them ⊥[3] not to remove the plaintiff until the canine finished the track. When Clewett and the dog arrived, Blanchard and Harmon yanked White to his feet. As White stood up, the dog bit his right elbow. Clewett ordered the dog to stop. Harmon examined the plaintiff's bleeding arm and determined that White required medical attention at a hospital.

On March 11, 1993, the plaintiff brought an action in Michigan state court, alleging state law causes of action in addition to a § 1983 cause of action. The defendants removed to federal court, but the district court remanded the state causes of action. For

the remaining § 1983 claim, the plaintiff alleged that the individual officers violated the Fourth Amendment bar against unreasonable seizures by using excessive force in arresting him. In addition, the plaintiff alleged that the City of Taylor was deliberately indifferent to his rights by inadequately training Clewett and the dog.

During discovery, White deposed Clewett who testified that the City had not provided him any canine-handling training aside from handing him some unspecified written policy. Remarkably, the defendants' counsel did not ask Clewett any questions for clarification. In addition, the defendants proffered no evidence explaining the training, if any received by the police dog. At oral argument, the defendants' counsel

asserted that both the canine handler and the dog are "certified," but the record below does not disclose that either Clewett or the dog had received any "tracking" training.

The individual defendants moved for summary judgment on the ground of qualified immunity. The City moved for summary judgment, claiming that the plaintiff's evidence did not establish deliberate indifference. All defendants moved for summary judgment on the basis of collateral estoppel; White's state law claims had been rejected by a Michigan ⊥4 state court and jury. The district court denied the motions. The individual defendants now appeal.

II.

A.

Because the defendants claim

qualified immunity for their actions, the relevant question is the "'objective legal reasonableness' of the action[s] ...assessed in light of the legal rules that were 'clearly established' at the time it was taken.'" Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citations omitted). That is "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640.

The right claimed to be violated here is the plaintiff's Fourth Amendment right to be free from unreasonable seizures, specifically to be free from excessive force during the course of an arrest. Whether a seizure involved excessive force depends on the "objective reasonableness" of the seizure (not to be

confused with the "objective legal reasonableness" term used to describe qualified immunity).

> "[A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure,'" should be analyzed under the Fourth Amendment's "objective reasonableness" test.

Matthews v. Jones, 35 F.3d 1046, 1050 (6th Cir. 1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). This test

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

[5] Graham, 490 U.S. at 396. We judge the "reasonableness" of the officer's use of

force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. Accordingly, the question here as to each individual defendant is whether (as to the qualified immunity aspect) a "reasonable official would understand that what he" did constituted (as to the excessive force aspect) an "objectively [un]reasonable" seizure.

We conclude that, based on the existing record, Officer Clewett is not entitled to qualified immunity. Viewing the evidence in the light most favorable to the plaintiff, Clewett requested, for no apparent reason, at least no reason found in the record, that other officers postpone taking the plaintiff away so that he could bring a little-trained canine to the arrest scene. Clewett, who

himself had virtually no canine-handling training, then brought the dog, which Clewett knew had bitten someone on a previous occasion, into the immediate presence of the handcuffed plaintiff the dog was "tracking"; close enough to permit the dog to bite the plaintiff. A reasonable officer would understand that those facts constitute an objectively unreasonable seizure. The district court properly denied Clewett's motion for summary judgment.

However, the district court should have granted Harmon and Blanchard's motions. The record shows that these two officers were "told" by Clewett not to remove the plaintiff until the dog finished the track. There is no evidence that Blanchard knew that the City had failed to train Clewett and the dog. A

reasonable official would not understand that it was objectively unreasonable to heed Clewett's request. As far as Blanchard knew, Clewett and the dog were adequately trained. Similarly, although Harmon knew that some written canine policy exited, he did not know the policy's content, and the ⊥[6] evidence does not show that Harmon knew how little training Clewett and the dog received. Harmon did know of one other biting incident involving Clewett's dog, but that knowledge does not render unreasonable Harmon's decision to wait for Clewett and the dog to appear. Accordingly, the district court should have entered summary judgment for Harmon and Blanchard on the basis of qualified immunity.

B.

The district court's order denying summary judgment on the basis of collateral estoppel or issue preclusion is not an independently final, appealable order under 28 U.S.C. § 1291. In order to decide this issue, we would have to exercise pendent "issue" appellate jurisdiction, and there is no reason to do so. The denial of summary judgment on issue preclusion grounds is neither "inextricably intertwined" with the appealable qualified immunity judgment nor necessary in order to ensure "meaningful review" of the qualified immunity judgment. See Swint, et al. v. Chambers County Comm'n, et al., 115 S. Ct. 1203 (1995); see also Johnson v. Jones, 115 S. Ct 2151 (1995). We decline to exercise jurisdiction over this aspect

of the district court's order.

III.

To summarize, we **AFFIRM** the denial of summary judgment on qualified immunity as to Officer Clewett; **REVERSE** the denial of summary judgment on qualified immunity as to Officers Harmon and Blanchard; and **DECLINE** to exercise pendent "issue" appellate jurisdiction over the defendants' appeal on the basis of issue preclusion and **DISMISS** this aspect of the appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

v.

CITY OF TAYLOR, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, jointly and severally,

Defendants.
_____/

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On December 6, 1993, defendants filed the instant motion for summary judgment. Plaintiff filed a reply December 28, 1993. On February 17, 1994, defendants filed a reply. Discovery closed in this case November 19, 1993. Oral argument was heard April 6, 1994.

I. Facts

At approximately 7:30 a.m., April 30, 1991, plaintiff was arrested by

defendants on a charge of Unlawfully Driving Away an Automobile.[1] According to the police reports submitted by defendants in support of their motion for summary judgment, at 5:30 a.m. on April 30, 1991, Officers Mize and Blanchard were on Breast ⊥[2] Road investigating two abandoned vehicles they believed had been stolen when they saw other two vehicles: one, a blue Firebird driven by plaintiff, and the other a black GM pickup truck

[1] What occurred on the evening prior to plaintiff's arrest is a matter of dispute between the parties. Defendants claim that plaintiff stole a car, although the charge against him was dismissed when defendants failed to produce certain witnesses. Plaintiff claims that the car was stolen by his friend, Isaac Rickles, without his assistance or knowledge. Although what happened the night before does not appear to the court to be relevant to the issue raised by plaintiff's complaint, the court will assume for purposes of this motion that plaintiff's version of the facts is true and accurate.

driven by plaintiff's friend Isaac Rickles. The officers became suspicious when they observed the vehicles repeatedly starting toward them and then stopping.[2]

The officers split up: Officer Blanchard pulled over Rickles and, after learning that he was driving with a suspended license, arrested him; Officer Mize followed plaintiff and saw him pull into a driveway. Plaintiff exited the Firebird and knocked on the door of the house. Plaintiff then went around the side of the house and jumped a fence. Mize checked the car plaintiff had been

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[2] The officers suspected that the area was a drop-off point for stolen vehicles. They believed the two stolen vehicles they were investigating had been dropped off within the last twenty minutes. They therefore thought it possible that plaintiff and Rickles were in the area to drop off another stolen vehicle.

driving; he found that the car had steering column damage and that the engine was running without keys in ignition. Officer Mize then radioed for assistance, indicating over the radio that plaintiff was suspected of driving a stolen vehicle.

Responding to Officer Mize's radio transmission, a third officer, Officer Harmon, began searching for plaintiff. Upon arriving at the area where plaintiff reportedly was, Harmon spotted plaintiff running into the woods. Harmon shouted at plaintiff from a distance of 25 or 30 feet to halt; plaintiff turned and looked at Harmon and then ran faster in the other direction. Harmon chased plaintiff with the patrol car for some time before finally finding [3] him in a field, tackling him and handcuffing him. As

Mize caught plaintiff, Officer Blanchard arrived at the scene.

After handcuffing plaintiff, Officers Harmon and Blanchard began dragging plaintiff to the police car. They had dragged him about 50 yards to a location near the patrol car, when they decided to wait there until the police dog had finished its track of plaintiff. After the dog had arrived, plaintiff was lifted to his feet by Officers Mize and Blanchard. As plaintiff attained a standing position, the dog grabbed hold of his right elbow and began pulling on it with his teeth. Officer Clewett told the dog to heel and it responded. Officer Harmon examined plaintiff's arm and saw that it was injured and bleeding. Plaintiff was then transported to the hospital for medical treatment.

At his deposition, Officer Clewett testified that the City of Taylor provided him with no formal training in the handling of police dogs other than to hand him some written policies. He further testified that he is not aware of any policy of the City of Taylor that requires any prisoner injuries to be reported or investigated, including injuries caused by the police dogs. Finally, Officer Clewett testified that he knows of only two incidents of police dog bites in the City of Taylor: those are plaintiff's injury and one other. Both bites were incurred by the same dog (a dog named Beau) while it was under the supervision of Officer Clewett.

On March 11, 1993, plaintiff filed a complaint in Wayne County Circuit Court alleging state and federal law claims.

Defendants ⊥[4] removed the action to this court on May 6, 1993. Exercising its discretion to retain or remand pendent claims, the court remanded Counts I and III which allege only state law claims and retained Counts II and IV which allege, respectively, a claim under 42 U.S.C. § 1983 and a claim for exemplary damages.

In Count II, plaintiff alleges that defendants violated his constitutional right to be free from unreasonable search and seizure, the right to be free of excessive force, and the right to due process.[3] Specifically, plaintiff

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[3] Although it is unclear from the complaint, it may be that plaintiff has included both the Fourth Amendment search and seizure claim and the due process claim as part of his excessive force claim. The court nevertheless addresses the issue of probable cause in subsection C of this opinion, because defendants argue it in their motion and

alleges that

> [d]efendant's [sic] permitted a police dog to bite Plaintiff on his right elbow at a time when Plaintiff was handcuffed [and that] [t]he conduct of allowing Plaintiff to be bitten by a police dog at a time when Plaintiff was completely subdued and in the complete control of the officers was grossly negligent.

Complaint at Para. 12 and 14.

Defendants bring their motion for summary judgment under Fed. R. Civ. P. 56, claiming that plaintiff has no evidence to support his section 1983 claim.

II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, deposition, answers to

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because plaintiff's response does not specifically identify it as a non-issue.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to ⊥[5] any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citation omitted). The Court must view the evidence in a light most favorable to the nonmovant as well

as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v

Catrett, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); Gregg, 801 F.2d at 861. [6]

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted); see also Celotex, 477 U.S. at 322-23; Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). Anderson, 477 U.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission of the issue to the jury. Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217 (E.D. Mich. 1990), aff'd, 929 F.2d 701 (6th Cir. 1991). The evidence itself need not be the sort admissible at trial. Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990). However, the evidence must be more than the nonmovant's own pleadings and affidavits. Id.

III. Analysis

A. Liability of the Municipality

In order for the City of Taylor to be held liable under section 1983, plaintiff must show that the alleged injury was inflicted pursuant to governmental custom, policy, or practice. Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978). [7] Under certain circumstances, a municipality can be held liable in section 1983 action for constitutional violations resulting from its failure to train municipal employees. City of Canton v. Harris, 489 U.S. 378, 392 (1989). More specifically, inadequacy of police training may serve as a basis for municipal liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into

contact. Id.

In the instant case, plaintiff presents the deposition of Officer Clewett stating that the City of Taylor offered him no training in the handling of police dogs other than to issue a handbook of written policies. Defendants offer no submission of the City's written policies and make no argument that they are sufficient training for the dog handlers. Because those who come into contact with police dogs can be very seriously injured,[4] it is possible that a trier of fact could find that the City's failure to train demonstrates a deliberate indifference to the rights of those persons. The court therefore finds

[4] In fact, the court is aware of at least one instance in which a police dog killed a suspect by biting him in the neck. Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988).

that there remains a genuine issue of material fact as to the adequacy of the City's training of officers who handle dogs.

B. Qualified Immunity of the Officers

The doctrine of qualified immunity shields government officials from civil liability for damage they cause in the course of performing discretionary functions, provided "their conduct does not violate clearly established statutory or constitutional rights

[8] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). When a defendant raises a qualified immunity argument in a motion for summary judgment, the plaintiff must satisfy a two-prong test: "First, the allegations must state a

claim of violation of clearly established law. Second, the plaintiff must present evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." Russo v. City of Cincinnati, 953 F.2d 1036, 1043 (6th Cir. 1992) (citations omitted).

The use of excessive force by police officers gives rise to a section 1983 action. Tennessee v. Garner, 471 U.S. 1, 8 (1985). All claims that law enforcement officials have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other seizure of a free citizen must be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a substantive due process

approach.[5] Graham v. Connor, 490 U.S. 386, 388 (1989). Whether the force used by the officers in arresting plaintiff was excessive, and thus violative of clearly established law, turns upon whether their actions were objectively reasonable under the circumstances. Id. at 397.

Defendants argue that they are protected by the doctrine of qualified immunity because there is no evidence that defendants intentionally caused the police dog to bite plaintiff. Defendants claim that the dog bite was accidental and that Officer Clewett,

[9] the dog handler, immediately called the dog off of plaintiff. It is the law,

---

[5] Thus, if plaintiff intended his due process allegation as part of his excessive force claim, the due process claim fails.

however, that negligence on the part of police officers in the apprehension and arrest of suspected criminals may form the basis of an excessive force claim. Pleasant v. Zamieski, 895 F.2d 272, 275-76 (1990) (accidental shooting of suspect by police is subject to review under objectively reasonable standard). The reasonableness test is an objective standard to be applied "without regard to the [officers'] underlying intent or motivation." Id. at 276, quoting Graham, 490 U.S. at 397. Thus, plaintiff need make no allegation that the officers specifically intended for the dog to bite him.

In the instant case, then, the question is whether it was objectively reasonable for the officers to allow the dog to complete the tracking of plaintiff

even though plaintiff was already in custody and completely under the officers' control.[6] Defendants offer no explanation as to why they waited for the dog to finish the tracking.[7] Plaintiff argues that there were no reasonable grounds for allowing the dog to approach him. Plaintiff also points out that the officers knew of the dog's propensity to

---

[6] There is some dispute among the defendants and between defendants and plaintiff as to whether plaintiff was struggling with the officers at this point. Some of the defendants testified that plaintiff was struggling, others that he was not. Plaintiff claims he was not struggling. However, none of the officers claim that the dog was employed because plaintiff was struggling. Thus, it is unclear what import, if any, this dispute carries. Moreover, for purposes of this motion, the court must view the evidence in a light most favorable to plaintiff.

[7] Perhaps there is a technical benefit to doing so, such as to maintain the training of the dog. However, without any explanation by defendants, one can only speculate.

⊥[10] bite because he had bitten a suspect before while under the control of Officer Clewett. Based on this previous behavior of the dog, it was foreseeable on the part of defendants that plaintiff would be bitten if the dog were allowed near him.

At his deposition, plaintiff testified that he did not see the dog prior to its biting him and that he did not know the dog was there until it bit him. He further testified that he did not hear or see any of the officers direct the dog to attack him or direct the dog to stop attacking him. Thus, the reasonableness of the officers' actions must be evaluated by reviewing other evidence such as the testimony of the officers, or the testimony of an expert as to the reasonable procedure with

respect to the use of dogs after a suspect has been apprehended, arrested and subdued.

For the foregoing reasons, the court finds that the reasonableness of the officers' actions in waiting for the dog to find plaintiff after plaintiff had already been arrested and subdued is a genuine issue of material fact that precludes summary judgment.

C. Probable Cause to Arrest Plaintiff

In their motion for summary judgment, defendants argue that the record clearly indicates that the police officers had probable cause to arrest plaintiff. Though the complaint alleges that defendants violated plaintiff's right to be free from unlawful search and seizure,[8] plaintiff offers no factual or

[8] See footnote 3.

legal argument rebutting defendants' version of the events that led up to his [11] arrest.

An arrest without a warrant may validly be made provided that the arrest is supported by probable cause. Gerstein v. Pugh, 420 U.S. 103, 113 (1975). Probable cause which will justify an arrest without a warrant exists where the facts and circumstances are sufficient in themselves to warrant a reasonable belief that an offense has been or is being committed by the person to be arrested. Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979).

In the instant case, just prior to plaintiff's arrest Officers Mize and Blanchard were investigating two abandoned vehicles which they believed had been stolen. They further believed

that the area was a drop-off point for stolen cars. Seeing two cars stopping and starting as the drivers approached the suspected drop-off point, at 5:30 a.m., the officers understandably became suspicious.

Officer Mize surveyed plaintiff's actions. When the officer looked into the vehicle plaintiff had been driving, he saw steering column damage and no keys in the ignition of a running vehicle. These facts corroborated Mize's initial suspicion that the vehicle was stolen.

Officer Harmon, who ultimately was responsible for plaintiff's arrest, was relying on Mize's radio report which gave a description of plaintiff and stated that he was suspected of driving a stolen vehicle. When Officer Harmon spotted plaintiff on foot, Harmon told plaintiff

to halt but plaintiff fled.

These facts clearly support the officers' belief that plaintiff had committed the crime of driving a stolen vehicle. [12] Thus, the court finds that any claim by plaintiff that he was arrested without probable cause must fail.

D. Effect of State Court Proceedings on the Federal Action

In their reply to plaintiff's response, defendants argue that because the remanded state court claims of plaintiff were ultimately decided in defendants' favor, that defendants are entitled to judgment on plaintiff's Count II under the doctrine of res judicata. Defendants claim that the state court judge used a federal law jury instruction in instructing the jury on the issue of plaintiff's excessive force claim brought

under Michigan law.

In non-=diversity cases in federal court, federal collateral estoppel rules apply in determining the effect of a prior judgment. Gambocz v. Velencsics, 468 F.2d 837, 841 n.4 (3d Cir. 1972). The court's jurisdiction over this case arises under 42 U.S.C. § 1983. Therefore, federal collateral estoppel rules apply.

Before a court may apply collateral estoppel to bar litigation of an issue, four specific requirements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
>
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;
>
> (3) the prior proceeding must have resulted in a final

judgment on the merits; and

> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers' Ass'n, 821 F.2d 328, 330 (6th Cir. 1987) (emphasis added). The issue of [13] excessive force under Michigan constitutional law raised in the state court action between plaintiff and defendants may have been similar to the issue before this court. However, it was not "the precise issue raised in the present case." Thus, the court cannot find that plaintiff is estopped from litigating his federal law claim.

For the foregoing reasons, defendants' motion for summary judgment shall be **DENIED**.

ORDER

Therefore, it is hereby **ORDERED** that defendants' motion for summary judgment is **DENIED.**

SO ORDERED.

Dated: 4/14/94

/ s /
PAUL V. GADOLA
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEONARD GREEN
CLERK

TELEPHONE
(513)684-2953
FTS 684-2953

June 26, 1995

Gina U. Puzzuoli, Esq.
Amos E. Williams, Esq.

Re: No. 94-1456
Ricky A. White v. R. Harmon, et al.

Dear Counsel:

As you have previously been advised, this appeal is scheduled for oral argument on July 24, 1995.

You should be prepared to address at argument the effect on this case, if any, of the June 12, 1995 decision of the U.S. Supreme Court in *Tyson Johnson, et al. v Houston Jones*, 63 LW 4552.

Very truly yours,

/ S /

Leonard Green, Clerk

538 U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

95-845

Supreme Court, U.S.
FILED
FEB 21 1996
CLERK

No. 94-1456

In The

Supreme Court of the United States

October Term, 1995

RICKY A. WHITE,

Petitioner,

vs.

CITY OF TAYLOR, R. HARMON, R. CLEWETT and OFFICER BLANCHARD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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56 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether this Honorable Court's decision in *Johnson* v *Jones*, 115 S Ct 2151 (1995), should have had any effect on the Sixth Circuit Court of Appeals' jurisdiction to hear an immediate appeal of the trial court's order denying summary judgment to the individual Defendants which was based on qualified immunity when the case of *Johnson* v *Jones* was not decided until June 12, 1995 and the appellees' claim of appeal was filed on or about April 14, 1994, and where the trial court's decision held, *inter alia* that "whether the force used by the officers in arresting the Plaintiff was excessive, and was violative of clearly established law, turns upon whether their actions were objectively reasonable under the circumstances.

PARTIES

The Petitioner/Appellant is the Plaintiff, who brought suit against numerous Defendants in state court, such action being removed to the Federal District Court, and the Federal District Court then remanding the state law claims back to state court. At the trial in state court the jury of eight unanimously agreed that the Defendants were not grossly negligent, did not assault and batter Plaintiff, and did not use excessive force on the Plaintiff. The Plaintiff then pursued his case in the United States District Court, Eastern District of Michigan, Southern Division as to his claim of excessive force and the Defendants filed a Motion for Summary Judgment which was denied, and which they appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals reversed the District Court's decision as to the denial of qualified immunity to Corporals R. Harmon and Blanchard, but affirmed as to Corporal Clewett. The Plaintiff/Appellant then filed his Petition for Writ of Certiorari regarding the Sixth Circuit Court of Appeals' decision. At this time, the City of Taylor, and Cpl. Clewett will be forced to endure another trial, this time in federal court, which is presently scheduled for March 1996.

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Petition for Writ of Certiorari from the August 31, 1995 Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit be denied by this Court.

COUNTER-STATEMENT OF OPINIONS BELOW

1. Sixth Circuit Court of Appeals' Opinion, #94-1456, August 31, 1995 (Contie, Ryan and Suhrheinrich, Circuit Judges)

2. United States District Court (Eastern District of Michigan) Opinion and Order Denying Defendants' Motion for Summary Judgment, #93-17933, April 14, 1994 (Judge Paul V. Gadola)

3. State of Michigan (Wayne County Circuit Court) Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Disposition as it pertains to the City of Taylor, #93-307261 NO, December 10, 1993 (Judge Susan D. Borman)

4. State of Michigan (Wayne County Circuit Court) Order Granting Directed Verdict to Corporal Ronald Harmon on all of Plaintiff's claims, #93-307261 NO, February 10, 1994 (Judge Michael L. Stacey, acting on behalf of Judge Susan D. Borman)

5. State of Michigan (Wayne County Circuit Court) Order Granting Partial Directed Verdict to Corporal Ron Clewett, #93-307261 NO, February 10, 1994 (Judge

Michael L. Stacey, acting on behalf of Judge Susan D. Borman)

6. State of Michigan (Wayne County Circuit Court) Judgment for Cpl. Ronald Clewett, #93-307261 NO, February 10, 1994 (Judge Michael L. Stacey, acting on behalf of Judge Susan D. Borman)

JURISDICTION

Respondents agree with the jurisdictional statement provided by the Petitioner.

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 USC 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation or custom, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right provided by the Constitution and laws, shall be liable to the party injured in action at law. . . .

COUNTER-STATEMENT OF THE CASE

The case filed by the Petitioner in Wayne County Circuit Court, State of Michigan, was brought against the City of Taylor and Corporals Clewett, Harmon and

Blanchard, alleging a violation of the United States Constitution, pursuant to 42 USC 1983, specifically, the right to be free from unreasonable search and seizure, the right to be free of excessive force, and the right to due process, and a violation of the Michigan Constitution, specifically the right to be free of excessive force, the right to be free of unreasonable seizures, the right to a fair investigation, the right to due process, assault and battery, and gross negligence. See App. pp.1-8.

The Defendants removed the case to the United States District Court, Eastern District of Michigan, Southern Division. The court exercised its pendent jurisdiction and, pursuant to 28 USC 1367 entered an Order of Partial Remand to Wayne County Circuit Court. See App. pp.9-11.

The Wayne County Circuit Court granted Defendant City of Taylor summary disposition on December 10, 1993 regarding Plaintiff's claims against the City of Taylor concerning all of the Plaintiff's allegations in his Complaint, including Plaintiff's allegations that customs, policies and practices of the City of Taylor were deliberately indifferent to the rights of Plaintiff; that Defendant City of Taylor failed to supervise, investigate and punish its officers who violated Plaintiff's rights and injured him; that Defendant City of Taylor granted complete discretion to its officers in the use of police dogs, to the foreseeable detriment of Plaintiff and others coming into contact with said officers. See App. pp.1-8.

The City of Taylor was granted summary disposition in the state court. The Plaintiff voluntarily dismissed Defendant Cpl. Keith Blanchard on the first day of trial.

The dismissal was without prejudice. The case went to trial as to Defendants, Corporals Ronald Harmon and Ronald Clewett. At the end of Plaintiff's proofs, the judge directed a verdict on behalf of Cpl. Clewett on Plaintiff's claim of assault and battery. The judge also granted Defendants' Motion for Directed Verdict on behalf of Cpl. Harmon on all of Plaintiff's claims, that is, gross negligence, assault and battery, and excessive force under the Michigan Constitution. A jury of eight then returned a unanimous verdict of no cause of action on Plaintiff's claims against Cpl. Ronald Clewett of gross negligence and excessive force under the Michigan Constitution. See App. pp.33-38.

The Defendants had moved for summary judgment in the federal court, pursuant to FR Civ P 56, prior to the case being tried in the state court, based on FR Civ P 56 and other various grounds, including qualified immunity. Plaintiff filed a response and Defendants filed a reply, (after the state court trial, to advise the federal court as to what occurred in the state court trial.) See App. pp.22-29.

The federal court denied Defendants' Motion for Summary Judgment. The court stated:

> Whether the force used by the officers in arresting Plaintiff was excessive, and thus violative of clearly established law, turns upon whether their actions were objectively reasonable under the circumstances.
>
> Defendants argue that they are protected by the doctrine of qualified immunity because there is no evidence that Defendants intentionally caused the police dog to bite plaintiff. Defendants claim that the dog bite was accidental and

> that Officer Clewett, the dog handler, immediately called the dog off of plaintiff. It is the law, however, that negligence on the part of police officers in the apprehension and arrest of suspected criminals may form the basis of an excessive force claim. *Pleasant* v *Zamieski*, 895 F2d 272, 275-76 (1990) (accidental shooting of a suspect by police is subject to review under objectively reasonable standard). The reasonable test is an objective standard to be applied "without regard to the officer's underlying intent or motivation." *Id.* at 276, quoting *Graham*, 490 US at 397. Thus, Plaintiff need make no allegation that the officers specifically intended for the dog to bite him. . . . Plaintiff argues that there were no reasonable grounds for allowing the dog to approach him. Plaintiff also points out that the officers knew of the dog's propensity to bite because he had bitten a suspect before while under the control of Officer Clewett. Based on this previous behavior of the dog, it was foreseeable on the part of defendants that plaintiff would be bitten if the dog were allowed near him.

(See App. p.20.)

It is undisputed by any evidence that the prior bite of this dog was based on a search and find of a breaking and entering suspect who fled from the scene. It is also undisputed that although the suspect was warned that the officer was a K-9 officer and would release the dog if the suspect did not stop, the suspect continued to flee. The dog was released and apprehended the suspect.

The Petitioner states at p.9 of his Statement of the Case that it is undisputed that Petitioner was attacked

and severely injured by a police dog on a leash after Petitioner had been arrested and handcuffed. However, the Defendants dispute that the Petitioner was severely injured by the police dog and also dispute that the arrest of the Plaintiff had been completed.

The Defendants appealed the denial of their Motion for Summary Judgment by the federal court judge. Approximately one week prior to oral argument, the Sixth Circuit wrote a letter to counsel advising them to be prepared to discuss *Johnson* v *Jones*, 115 S Ct 2151 (1995).

Although the Petitioner claims *Johnson* involves similar facts to those in the case at bar, the Defendants strongly dispute that the facts have any similarity to those in this case. It is absurd for Petitioner's counsel to even suggest this as the facts in *Johnson* involve an allegation that five policemen beat the Plaintiff at the police station. The Plaintiff in that case ended up in the hospital with several broken ribs. There is no dispute that the law is clearly established that officers cannot take an arrestee into a booking room and beat him. It was the Defendant's argument in *Jones* that there was no evidence to support Plaintiff's allegations. Under those circumstances, the underlying dispute involved the application of clearly established law.

In this case, Defendant's argument, in part, was that the law was not clearly established regarding the use of K-9s to track suspects at the time of this incident in 1991, specifically April 29, 1991.

Although the Petitioner argues that the appellate court "speculated wildly" as to the subjective intent and the knowledge of Defendants Harmon and Blanchard

and, based upon that speculation, reversed the trial court's denial of summary judgment, these Defendants deny this and state that the appellate court's decision was based on the undisputed evidence before it. Defendants also submit that since the law was not clearly established at the time, under the facts of this case, Corporal Clewett was, and is entitled to qualified immunity in this case.

SUMMARY OF ARGUMENT

In this case the decision of the Sixth Circuit, as it pertains to Corporals Harmon and Blanchard, is consistent with the decision of the Supreme Court on the issue of immediate appealability of the qualified immunity defense. However, these Defendants submit that it is not consistent as it relates to Cpl. Clewett. It is this Defendant's position that the law was not clearly established in 1991 regarding the use of K-9s in police work.

In this case, it is undisputed that Plaintiff fled from the officers and was apprehended by Cpl. Harmon after a chase. After Plaintiff was handcuffed, Cpl. Harmon directed him to stand up several times. The Plaintiff refused. Cpl. Harmon and another officer then began pulling Plaintiff toward the patrol car. When Cpl. Harmon radioed to inform the other officers that Plaintiff had been apprehended, he was told by Cpl. Clewett, the K-9 handler, that he should not remove Plaintiff from the area until the track was finished. At that time, Cpl. Harmon let go of Plaintiff. Cpl. Clewett then arrived with the K-9, allowed him to sniff Plaintiff, and called him to heel. Cpl. Harmon then requested Plaintiff stand up so that he could be walked to the patrol car. The dog lunged toward

the Plaintiff, biting him on the right elbow. The dog was never ordered or commanded to bite the Plaintiff, but did so on his own. Cpl. Clewett immediately reacted to the situation and called the dog out. The dog heeled immediately. The Plaintiff's wound was examined and Plaintiff was taken to the hospital for medical attention immediately.

There is no dispute as to these issues. Again, the law was not clearly established regarding the use of a K-9 to apprehend a suspect, including at what point the track by the dog should be stopped. Based on the fact that the law was not clearly established and the facts were not in dispute in this case, all Defendants should have been granted qualified immunity.

REASONS FOR DENYING THE WRIT

If this Honorable Court holds that the Sixth Circuit Court of Appeals was without jurisdiction to hear this appeal, then it certainly seems that any case involving qualified immunity could not be heard by an appellate court, based upon the Supreme Court's decision in *Johnson*. This case is similar to *Mitchell* v *Forsyth*, 478 US 511, 86 L Ed 2d 411, 105 S Ct 2806. *Mitchell* involved an unauthorized wire tap. Although the law was clearly established that unreasonable searches and seizures are unconstitutional, the specific question of Mitchell's immunity, as stated by the court was whether it was clearly established in November 1970 that such wiretaps were unconstitutional. The court concluded that it was not. In this case, the question of the officers' immunity turns on whether it was clearly established in April 1991

that such use of dogs was unconstitutional, the court must conclude that it was not.

CONCLUSION

The Defendants respectfully request that this Honorable Court deny Plaintiff's Petition for Writ of Certiorari as the law was not clearly established, the evidence was not in dispute, and the Defendants, Corporals Harmon and Blanchard are entitled to qualified immunity as is Corporal Clewett. Additionally, Defendants request that if this Honorable Court grants Plaintiff's Petition for Writ of Certiorari, it should also review the decision of the Sixth Circuit Court of Appeals regarding Cpl. Clewett.

Respectfully submitted,

DISE & ASSOCIATES, P.C.
GINA U. PUZZUOLI P37992
3600 Cadillac Tower
Detroit, Michigan 48226
(313) 963-8155
Attorneys for Respondents

DATED: February 20, 1996

APPENDIX

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APPENDIX

THE STATE OF MICHIGAN

IN THE COURT OF WAYNE COUNTY

RICKY A. WHITE,

Plaintiff,

vs.

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and severally,

Defendants.

93-307261 NO
3/11/93
JDG:
SUSAN D BORMAN
WHITE RICKY A
VS
TAYLOR CITY OF

_____/

WILLIAMS & YOUNGBLOOD, P.C.
AMOS E. WILLIAMS (P39118)
Attorney for Plaintiff
2701 Cadillac Tower
Detroit, Michigan 48226
(313) 963-5222

_____/

Complaint and Jury Demand

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is

either pending or was previously filed and dismissed, transferred, or otherwise disposed of having been assigned to a judge in this Court.

/s/ Amos E. Williams
AMOS E. WILLIAMS P39118

COMPLAINT AND JURY DEMAND

NOW COMES the plaintiff, RICKY A. WHITE, by and through his attorneys, WILLIAMS & YOUNGBLOOD, P.C., and for his Complaint against the Defendants say:

1. Plaintiff is a resident of Wayne County, Michigan.

2. Defendant City of Taylor is a municipal corporation located in Wayne County, Michigan.

3. Defendants Harmon, Clewett and Blanchard were at all times pertinent Police Officers employed by City of Taylor.

4. Defendants Harmon, Clewett and Blanchard were at all times pertinent, acting under the Color of Law and pursuant to the customs, policies and practices of the City of Taylor.

5. Defendants Harmon, Clewett and Blanchard are here sued in their official and their individual capacities.

6. Plaintiff's claim against City of Taylor is based upon the customs, policies and practices of the Defendant and is not a claim for vicarious Liability or Respondeat superior.

7. At all times pertinent the conduct of the individual Defendant's was grossly negligent as that term is defined in the applicable statutes.

8. Plaintiff seeks damages in excess of $10,000 as a jury shall determine together with interest, costs, attorney fees, exemplary and punitive damages.

COUNT I
ASSAULT AND BATTERY

9. Plaintiff alleges paragraph [sic] 1-8 and by reference incorporates all paragraph [sic] of the Complaint.

10. On April 30, 1991, Defendant's Harmon, Blanchard and Clewett did subdue and handcuff Plaintiff in the City of Taylor.

11. The force used by the Defendant's was objectively unreasonable and excessive.

12. Defendant's permitted a police dog to bite Plaintiff on his right elbow at a time when Plaintiff was handcuffed.

13. The force used beyond that which was necessary constituted a battery.

14. The conduct of allowing Plaintiff to be bitten by a police dog at a time when Plaintiff was completely subdued and in the complete control of the officers was grossly negligent.

15. The conduct of these Defendants created in Plaintiff a reasonable fear and apprehension of a harm or offensive bodily contact.

16. As a direct and proximate result of the Defendants actions, Plaintiff suffered injury and damages including but not limited to:

A. Physical pain and suffering, past & future;

B. Mental anguish, past and future;

C. Physical injury requiring surgery;

D. Loss of earnings, past and future;

E. Loss of earning capacity, past and future;

F. Humiliation, anxiety and shame;

G. Medical expenses, past and future;

H. Doctors Bills, past and future; and

I. Permanent injury and disfigurement.

WHEREFORE Plaintiff demands judgment against Defendants for whatever amount in excess of $10,000.00 as a jury shall determine together with interest, costs, attorney fees, exemplary and punitive damages.

COUNT II
VIOLATION OF 42 USC § 1983

17. Plaintiff realleges paragraphs 1 through 16 and by reference incorporates all paragraphs of the Complaint.

18. Defendants use of force against Plaintiff was excessive, unnecessary and objectively unreasonable.

19. The Defendant's acts of arresting Plaintiff were carried out under color of State Law.

20. The conduct of the Defendants violated Plaintiff's rights including but not limited to:

A. Right to be free from unreasonable search and seizure;

B. The right to be free of excessive force; and

C. The right to due process.

21. The custom, policies, and practices of City of Taylor were deliberately indifferent to Plaintiff's rights.

22. The City of Taylor failed to supervise, investigate, discipline or punish Defendant officers.

23. The customs, policies and practices of City of Taylor encourage, condone and perpetuate unconstitutional behavior by its Police officers.

24. As a direct and proximate result of the Defendants actions, Plaintiff suffered injury and damages including but not limited to:

A. Physical pain and suffering, past & future;

B. Mental anguish, past and future;

C. Physical injury requiring surgery;

D. Loss of earnings, past and future;

E. Loss of earning capacity, past and future;

F. Humiliation, anxiety and shame;

G. Medical expenses, past and future;

H. Doctors Bills, past and future; and

I. Permanent injury and disfigurement.

WHEREFORE Plaintiff demands judgment against Defendants for whatever amount in excess of $10,000.00

as a jury shall determine together with interest, costs, attorney fees, exemplary and punitive damages.

COUNT III
VIOLATION OF MICHIGAN CONSTITUTION

25. Plaintiff realleges paragraphs 1 though 24 and by reference incorporates all paragraphs of the Complaint.

26. Plaintiff's rights under the Michigan Constitution include, but are not limited:

A. Right to be free of excessive force;

B. Right to be free of unreasonable seizure;

C. Right to a fair investigation;

D. Right to due process.

27. The conduct of the individual Defendants violated each of Plaintiff's rights.

28. The customs, policies and practices of City of Taylor were deliberately indifferent to the rights of Plaintiff.

29. Defendant City of Taylor failed to institute needed policy with respect to safely handling police dogs.

30. In the alternative Defendant City of Taylor failed to enforce any policies on that issue.

31. Defendant City of Taylor granted complete discretion to its officers in the use of police dogs to the forseeable detriment of Plaintiff and others coming in contact with said officers.

32. Defendant City of Taylor failed to supervise, investigate and punish its officers who violated Plaintiff's rights and injured him.

33. As a direct and proximate result of the Defendants actions Plaintiff suffered injury and damages including but not limited to:

A. Physical pain and suffering, past and future;

B. Mental anguish, past and future;

C. Physical injury requiring surgery;

D. Loss of earning, past and future;

E. Loss of earning capacity, past and future;

F. Humiliation, anxiety and shame;

G. Medical expenses, past and future;

H. Doctors Bills, past and future; and

I. Permanent injury and disfigurement.

WHEREFORE Plaintiff demands judgment against Defendants for whatever amount a jury shall determine together with interest, costs, attorney fees, exemplary and punitive damages.

COUNT IV
EXEMPLARY DAMAGES

34. Plaintiff realleges paragraphs 1-33 and by reference incorporates all paragraphs of the Complaint.

35. The conduct of Defendant's Blanchard, Clewett and Harmon was not in good faith and in fact was reckless and malicious.

36. The conduct of these Defendants was reckless and in deliberate disregard of Plaintiff's rights.

37. Plaintiff suffered and [sic] permanent injury as a result of Defendant's conduct.

WHEREFORE Plaintiff demands exemplary damages in the amount of $500,000.

AMOS E. WILLIAMS, P.C.

By: /s/ Amos E. Williams
Amos E. Williams
(P39118)
Attorney for Plaintiff
2701 Cadillac Tower
Detroit, MI 48226
(313) 963-5222

Dated: March 10, 1993

DEMAND FOR JURY TRIAL

NOW COMES the Plaintiff, RICKY A. WHITE, by and through his attorneys, WILLIAMS & YOUNGBLOOD, P.C., and demands trial of his cause by jury.

AMOS E. WILLIAMS, P.C.

By: /s/ Amos E. Williams
Amos E. Williams
(P39118)
Attorney for Plaintiff
2701 Cadillac Tower
Detroit, MI 48226
(313) 963-5222

Dated: March 10, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

v.

CITY OF TAYLOR, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, jointly and severally,

Defendants.
_____/

CASE NO. 93-71933

HONORABLE PAUL V. GADOLA

ORDER OF PARTIAL REMAND

Plaintiffs filed their complaint in this matter March 11, 1993, in Wayne County Circuit Court (Case No. 93-307261-NO). On April 15, 1993 each defendant received a summons and copy of the complaint. Defendants then filed their notice of removal May 6, 1993, on the basis of federal question jurisdiction.

Plaintiff pleads four counts in his complaint. Counts I and III allege state law claims. Count II alleges a claim under 42 U.S.C. § 1983 and Count IV asks for "exemplary damages."

This court has discretion to exercise its pendent jurisdiction. 28 U.S.C. § 1367(c); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). in exercising its discretion, the court must look to "considerations of judicial economy, convenience and fairness to the litigants" and avoid needless decisions of state law. *Id.* at 726; *see also* C. Wright, A. Miller & E. Cooper.

Federal Practice & Procedure § 3567.1 (2d ed. 1984).

Recent litigation in the federal courts involving federal law claims together with pendent state law claims has caused procedural and substantive problems. Although the federal and state claims in this action arise out of the same factual situation, litigating these claims together may not serve judicial economy or trial convenience.

Because federal and state law each have a different focus, and because the two bodies of law have evolved at different times and in different legislative and judicial systems, in almost every case with pendent state claims, the courts and counsel are unduly preoccupied with substantive and procedural problems in reconciling the two bodies of law and providing a fair and meaningful proceeding.

The attempt to reconcile these two distinct bodies of law often dominates and prolongs a pre-trial practice, complicates the trial, makes the jury instructions longer, confuses the jury, results in inconsistent verdicts, and causes post-trial problems with respect to judgment interest and attorney fees. Thus, it appears that in many cases the apparent judicial economy and convenience of the parties' interest in the entertainment of pendent state claims may be offset by the problems they create.

For the foregoing reasons, this court, on its own motion, shall remand Counts I and III of the complaint. Count IV as it pertains to Counts I and III shall also be remanded.

Therefore, it is hereby **ORDERED** that Counts I and III of the complaint are **REMANDED** to Wayne County Circuit Court.

It is further **ORDERED** that Count IV as it pertains to Counts I and III is also **REMANDED** to Wayne County Circuit Court. **SO ORDERED.**

Dated: 5/12/93

/s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

v.

CITY OF TAYLOR, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, jointly and severally,

Defendants.
_____/

CIVIL ACTION
NO. 93-71933

HONORABLE
PAUL V. GADOLA
U.S. DISTRICT JUDGE

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed April 14, 1994)

On December 6, 1993, defendants filed the instant motion for summary judgment. Plaintiff filed a reply December 28, 1993. On February 17, 1994, defendants filed a reply. Discovery closed in this case November 19, 1993. Oral argument was heard April 6, 1994.

I. Facts

At approximately 7:30 a.m., April 30, 1991, plaintiff was arrested by defendants on a charge of Unlawfully Driving Away an Automobile.[1] According to the police

[1] What occurred on the evening prior to plaintiff's arrest is a matter of dispute between the parties. Defendants claim that plaintiff stole a car, although the charge against him was dismissed when defendants failed to produce certain witnesses.

reports submitted by defendants in support of their motion for summary judgment, at 5:30 a.m. on April 30, 1991, Officers Mize and Blanchard were on Brest Road investigating two abandoned vehicles they believed had been stolen when they saw other two vehicles: one, a blue Firebird driven by plaintiff, and the other a black GM pickup truck driven by plaintiff's friend Isaac Rickles. The officers became suspicious when they observed the vehicles repeatedly starting toward them and then stopping.[2]

The officers split up: Officer Blanchard pulled over Rickles and, after learning that he was driving with a suspended license, arrested him; Officer Mize followed plaintiff and saw him pull into a driveway. Plaintiff exited the Firebird and knocked on the door of the house. Plaintiff then went around the side of the house and jumped a fence. Mize checked the car plaintiff had been driving; he found that the car had steering column damage and that the engine was running without keys in

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Plaintiff claims that the car was stolen by his friend, Isaac Rickles, without his assistance or knowledge. Although what happened the night before does not appear to the court to be relevant to the issues raised by plaintiff's complaint, the court will assume for purposes of this motion that plaintiff's version of the facts is true and accurate.

[2] The officers suspected that the area was a drop-off point for stolen vehicles. They believed the two stolen vehicles they were investigating had been dropped off within the last twenty minutes. They therefore thought it possible that plaintiff and Rickles were in the area to drop off another stolen vehicle.

ignition. Officer Mize then radioed for assistance, indicating over the radio that plaintiff was suspected of driving a stolen vehicle.

Responding to Officer Mize's radio transmission, a third officer, Officer Harmon, began searching for plaintiff. Upon arriving at the area where plaintiff reportedly was, Harmon spotted plaintiff running into the woods. Harmon shouted at plaintiff from a distance of 25 or 30 feet to halt; plaintiff turned and looked at Harmon and then ran faster in the other direction. Harmon chased plaintiff with the patrol car for some time before finally finding him in a field, tackling him and handcuffing him. As Mize caught plaintiff, Officer Blanchard arrived at the scene.

After handcuffing plaintiff, Officers Harmon and Blanchard began dragging plaintiff to the police car. They had dragged him about 50 yards to a location near the patrol car, when they decided to wait there until the police dog had finished its track of plaintiff. After the dog had arrived, plaintiff was lifted to his feet by Officers Mize and Blanchard. As plaintiff attained a standing position, the dog grabbed hold of his right elbow and began pulling on it with his teeth. Officer Clewett told the dog to heel and it responded. Officer Harmon examined plaintiff's arm and saw that it was injured and bleeding. Plaintiff was then transported to the hospital for medical treatment.

At his deposition, Officer Clewett testified that the City of Taylor provided him with no formal training in the handling of police dogs other than to hand him some written policies. He further testified that he is not aware

of any policy of the City of Taylor that requires any prisoner injuries to be reported or investigated, including injuries caused by the police dogs. Finally, Officer Clewett testified that he knows of only two incidents of police dog bites in the City of Taylor: those are plaintiff's injury and one other. Both bites were incurred by the same dog (a dog named Beau) while it was under the supervision of Officer Clewett.

On March 11, 1993, plaintiff filed a complaint in Wayne County Circuit Court alleging state and federal law claims. Defendants removed the action to this court on May 6, 1993. Exercising its discretion to retain or remand pendent claims, the court remanded Counts I and III which allege only state law claims and retained Counts II and IV which allege, respectively, a claim under 42 U.S.C. § 1983 and a claim for exemplary damages.

In Count II, plaintiff alleges that defendants violated his constitutional right to be free from unreasonable search and seizure, the right to be free of excessive force, and the right to due process.[3] Specifically, plaintiff alleges that

> [d]efendant's [sic] permitted a police dog to bite Plaintiff on his right elbow at a time when Plaintiff was handcuffed [and that] [t]he conduct of allowing Plaintiff to be bitten by a police dog at

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[3] Although it is unclear from the complaint, it may be that plaintiff has included both the Fourth Amendment search and seizure claim and the due process claim as part of his excessive force claim. The court nevertheless addresses the issue of probable cause in subsection C of this opinion, because defendants argue it in their motion and because plaintiff's response does not specifically identify it as a non-issue.

> a time when Plaintiff was completely subdued and in the complete control of the officers was grossly negligent.

Complaint at Para. 12 and 14.

Defendants bring their motion for summary judgment under Fed. R. Civ. P. 56, claiming that plaintiff has no evidence to support his section 1983 claim.

II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citation omitted). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *See Gregg v.*

Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); *Gregg*, 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted); *see also Celotex*, 477 U.S. at 322-23; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson*, 477 U.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission of the issue to the jury. *Lucas v. Leaseway Multi Transp. Serv., Inc.*, 738

F. Supp. 214, 217 (E.D. Mich. 1990), *aff'd*, 929 F.2d 701 (6th Cir. 1991). The evidence itself need not be the sort admissible at trial. *Ashbrook v. Block*, 917 F.2d 918, 921 (6th Cir. 1990). However, the evidence must be more than the nonmovant's own pleadings and affidavits. *Id.*

III. Analysis

A. Liability of the Municipality

In order for the City of Taylor to be held liable under section 1983, plaintiff must show that the alleged injury was inflicted pursuant to a governmental custom, policy, or practice. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978). Under certain circumstances, a municipality can be held liable in section 1983 action for constitutional violations resulting from its failure to train municipal employees. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). More specifically, inadequacy of police training may serve as a basis for municipal liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact. *Id.*

In the instant case, plaintiff presents the deposition of Officer Clewett stating that the City of Taylor offered him no training in the handling of police dogs other than to issue a handbook of written policies. Defendants offer no submission of the City's written policies and make no argument that they are sufficient training for the dog handlers. Because those who come into contact with

police dogs can be very seriously injured,[4] it is possible that a trier of fact could find that the City's failure to train demonstrates a deliberate indifference to the rights of those persons. The court therefore finds that there remains a genuine issue of material fact as to the adequacy of the City's training of officers who handle dogs.

B. Qualified Immunity of the Officers

The doctrine of qualified immunity shields government officials from civil liability for damage they cause in the course of performing discretionary functions, provided "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When a defendant raises a qualified immunity argument in a motion for summary judgment, the plaintiff must satisfy a two-prong test: "First, the allegations must state a claim of violation of clearly established law. Second, the plaintiff must present evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Russo v. City of Cincinatti* [sic], 953 F.2d 1036, 1043 (6th Cir. 1992) (citations omitted).

The use of excessive force by police officers gives rise to a section 1983 action. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). All claims that law enforcement officials have used excessive force – deadly or not – in the course of an

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[4] In fact, the court is aware of at least one instance in which a police dog killed a suspect by biting him in the neck. *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

arrest, investigatory stop, or other seizure of a free citizen must be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a substantive due process approach.[5] *Graham v. Connor*, 490 U.S. 386, 388 (1989). Whether the force used by the officers in arresting plaintiff was excessive, and thus violative of clearly established law, turns upon whether their actions were objectively reasonable under the circumstances. *Id.* at 397.

Defendants argue that they are protected by the doctrine of qualified immunity because there is no evidence that defendants intentionally caused the police dog to bite plaintiff. Defendants claim that the dog bite was accidental and that Officer Clewett, the dog handler, immediately called the dog off of plaintiff. It is the law, however, that negligence on the part of police officers in the apprehension and arrest of suspected criminals may form the basis of an excessive force claim. *Pleasant v. Zamieski*, 895 F.2d 272, 275-76 (1990) (accidental shooting of suspect by police is subject to review under objectively reasonable standard). The reasonableness test is an objective standard to be applied "without regard to the [officers'] underlying intent or motivation." *Id.* at 276, *quoting Graham*, 490 U.S. at 397. Thus, plaintiff need make no allegation that the officers specifically intended for the dog to bite him.

In the instant case, then, the question is whether it was objectively reasonable for the officers to allow the

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[5] Thus, if plaintiff intended his due process allegation as part of his excessive force claim, the due process claim fails.

dog to complete the tracking of plaintiff even though plaintiff was already in custody and completely under the officers' control.[6] Defendants offer no explanation as to why they waited for the dog to finish the tracking.[7] Plaintiff argues that there were no reasonable grounds for allowing the dog to approach him. Plaintiff also points out that the officers knew of the dog's propensity to bite because he had bitten a suspect before while under the control of Officer Clewett. Based on this previous behavior of the dog, it was foreseeable on the part of defendants that plaintiff would be bitten if the dog were allowed near him.

At his deposition, plaintiff testified that he did not see the dog prior to its biting him and that he did not know the dog was there until it bit him. He further testified that he did not hear or see any of the officers direct the dog to attack him or direct the dog to stop attacking him. Thus, the reasonableness of the officers' actions must be evaluated by reviewing other evidence such as the testimony of the officers, or the testimony of an expert as to the reasonable procedure with respect to

---

[6] There is some dispute among the defendants and between defendants and plaintiff as to whether plaintiff was struggling with the officers at this point. Some of the defendants testified, that plaintiff was struggling, others that he was not. Plaintiff claims he was not struggling. However, none of the officers claim that the dog was employed because plaintiff was struggling. Thus, it is unclear what import, if any, this dispute carries. Moreover, for purposes of this motion, the court must view the evidence in a light most favorable to plaintiff.

[7] Perhaps there is a technical benefit to doing so, such as to maintain the training of the dog. However, without any explanation by defendants, one can only speculate.

the use of dogs after a suspect has been apprehended, arrested and subdued.

For the foregoing reasons, the court finds that the reasonableness of the officers' actions in waiting for the dog to find plaintiff after plaintiff had already been arrested and subdued is a genuine issue of material fact that precludes summary judgment.

C. Probable Cause to Arrest Plaintiff

In their motion for summary judgment, defendants argue that the record clearly indicates that the police officers had probable cause to arrest plaintiff. Though the complaint alleges that defendants violated plaintiff's right to be free from unlawful search and seizure,[8] plaintiff offers no factual or legal argument rebutting defendants' version of the events that led up to his arrest.

An arrest without a warrant may validly be made provided that the arrest is supported by probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). Probable cause which will justify an arrest without a warrant exists where the facts and circumstances are sufficient in themselves to warrant a reasonable belief that an offense has been or is being committed by the person to be arrested. *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979).

In the instant case, just prior to plaintiff's arrest Officers Mize and Blanchard were investigating two abandoned vehicles which they believed had been stolen. They further believed that the area was a drop-off point

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[8] See footnote 3.

for stolen cars. Seeing two cars stopping and starting as the drivers approached the suspected drop-off point, at 5:30 a.m., the officers understandably became suspicious.

Officer Mize surveyed plaintiff's actions. When the officer looked into the vehicle plaintiff had been driving, he saw steering column damage and no keys in the ignition of a running vehicle. These facts corroborated Mize's initial suspicion that the vehicle was stolen.

Officer Harmon, who ultimately was responsible for plaintiff's arrest, was relying on Mize's radio report which gave a description of plaintiff and stated that he was suspected of driving a stolen vehicle. When Officer Harmon spotted plaintiff on foot, Harmon told plaintiff to halt but plaintiff fled.

These facts clearly support the officers' belief that plaintiff had committed the crime of driving a stolen vehicle. Thus, the court finds that any claim by plaintiff that he was arrested without probable cause must fail.

D. Effect of State Court Proceedings on the Federal Action

In their reply to plaintiff's response, defendants argue that because the remanded state court claims of plaintiff were ultimately decided in defendants' favor, that defendants are entitled to judgment on plaintiff's Count II under the doctrine of *res judicata*. Defendants claim that the state court judge used a federal law jury instruction in instructing the jury on the issue of plaintiff's excessive force claim brought under Michigan law.

In non-diversity cases in federal court, federal collateral estoppel rules apply in determining the effect of a prior judgment. *Gambocz v. Yelencsics*, 468 F.2d 837, 841 n.4 (3d Cir. 1972). The court's jurisdiction over this case arises under 42 U.S.C. § 1983. Therefore, federal collateral estoppel rules apply.

Before a court may apply collateral estoppel to bar litigation of an issue, four specific requirements must be met:

> (1) the *precise* issue raised in the present case must have been raised and actually litigated in the prior proceeding;
>
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;
>
> (3) the prior proceeding must have resulted in a final judgment on the merits; and
>
> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers' Ass'n, 821 F.2d 328, 330 (6th Cir. 1987) (emphasis added). The issue of excessive force under Michigan constitutional law raised in the state court action between plaintiff and defendants may have been similar to the issue before this court. However, it was not "the precise issue raised in the present case." Thus, the court cannot find that plaintiff is estopped from litigating his federal law claim.

For the foregoing reasons, defendants' motion for summary judgment shall be **DENIED.**

ORDER

Therefore, it is hereby **ORDERED** that defendants' motion for summary judgment is **DENIED.**

SO ORDERED.

Dated: 4/14/94

/s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

-vs-

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and Severally,

Defendants.
_____ /

CA:
93-CV71937 DT

Hon:
PAUL V. GADOLA

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John H. Dise, Jr. P27266
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_____ /

SUPPLEMENT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants are filing this supplement to their Motion for Summary Judgment to inform the court of what has taken place since Defendants' Motion for Summary Judgment was filed. Specifically with regards to the

Plaintiff's state law case, the Wayne County Circuit Court granted Defendants' Motion for Summary Disposition to the City of Taylor. See Exhibit A.

The Plaintiff's claims against the individual Defendant officers in the state court case (who are the same Defendants here) were for gross negligence, assault and battery and a violation of constitutional and civil rights under the Michigan Constitution. The Plaintiff also made a claim under the Michigan Constitution for excessive force. The Plaintiff voluntarily dismissed Defendant Corporal Keith Blanchard on the first day of trial. The dismissal was without prejudice. The case went to trial as to Defendants Corporals Ronald Harmon and Ronald Clewett. At the end of Plaintiff's proofs, the judge directed a verdict on behalf of Corporal Clewett on Plaintiff's claim of assault and battery. The judge also granted our Motion for Directed Verdict on behalf of Corporal Harmon on all of Plaintiff's claims, that is gross negligence, assault and battery and excessive force under the Michigan Constitution. A jury of eight then returned a unanimous verdict of no cause of action on Plaintiff's claims against Corporal Ronald Clewett of gross negligence and excessive force under the Michigan Constitution.

Although prior to trial and during trial, the Defendants had requested the dismissal of the Plaintiff's claims under the state constitution of excessive force, as it has been Defendants' position all along that there is no such cause of action, the judge believed there is such a cause of action. In fact, the judge instructed the jury using federal jury instructions for a claim of excessive force. She merely replaced the words of the federal constitution with the

Michigan Constitution. The jury found that there was no violation of constitutional rights.

Therefore, the claims the Plaintiff brought here in federal court should be disposed of as the doctrine of res judicata applies. The parties in this case have litigated Plaintiff's claims of gross negligence, assault and battery and excessive force under the Michigan Constitution using federal jury instructions. Final judgment has been entered on all of the Plaintiff's claims with respect to Corporals Ronald Harmon and Ronald Clewett in their favor. The Plaintiff should not be able to relitigate his claims under the doctrine of res judicata. See *VanDeventer v. Michigan National Bank*, 172 Mich App 4[illegible]88). Here there has been a prior decision on the merits of Plaintiff's claims against the Defendants. See Judgment entering the jury verdict and Orders granting directed verdicts attached hereto as Exhibit B.

Based on the fact that the officers wee [sic] found not liable for an assault and battery on the Plaintiff and use of excessive force under the Michigan Constitution on the Plaintiff, there was no violation of Plaintiff's constitutional rights. In order to have a claim against the City of Taylor, the Plaintiff must first prove that there was a violation of a constitutional right. As the jury already decided as to Corporal Clewett and the judge as to Corporal Harmon that there was no violation of a constitutional right here, the Plaintiff's claim against the City of Taylor must fail.

CONCLUSION:

Based on the foregoing, these Defendants respectfully request this Honorable Court grant them Summary Judgment.

DISE & GUREWITZ, P.C.

BY: /s/ John H. Dise, Jr.
JOHN H. DISE, JR. P27266
GINA U. PUZZUOLI P37992
Attorneys for Defendants
3600 Cadillac Tower
Detroit, Michigan 48226
(313) 963-8155

DATED: February 17, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

-vs-

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and Severally,

Defendants.
_____ /

CA:
93-CV71937 DT

Hon:
PAUL V. GADOLA

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_____ /

AFFIDAVIT OF COUNSEL

STATE OF MICHIGAN]
] ss.
COUNTY OF WAYNE]

Gina U. Puzzuoli, first being duly sworn, deposes and says that she has read the attached Supplement to Defendants' Motion, and that the facts therein contained are true of her own knowledge, except as to those matters therein based on information and belief, and as to those matters she believes them to be true.

/s/ Gina U. Puzzuoli/jld
GINA U. PUZZUOLI P37992

Subscribed and sworn to before me
this 17th day of February, 1994.

/s/ Sheila Harrison
SHEILA HARRISON
Notary Public, Wayne County, MI
My Commission Expires 11/17/97

THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Ricky A. White
Plaintiff(s),
-v-
City of Taylor
Defendant(s).

93-307261 NO
Case No. 93-307-261NO
(Filed Dec. 10, 1993)

ORDER Granting in Part and Denying in Part Def's MTN for Sum Disposition.

At a session of said Court, held in the City County Building, Detroit, Michigan on DEC 10 1993.

PRESENT: HON. SUSAN D. BORMAN
Circuit Judge

This cause having come on for HEARING before the Court, and _____

IT IS ORDERED that Def's MTN for Sum Disp. is Granted in Part, and Denied in Part. City of Taylor dismissed w/prej; MTN denied as to Defs Clewett & Harmon; Taken under advisement as to Blanchard, Def's counsel to appear before City Council's next meeting to obtain settlement authority Barring obtaining authority in excess of $1,000.00 City Council will be ordered to convene in Court at a time to be scheduled by the Court during the week 12/13 – LT

/s/ Susan D. Borman
Susan D. Borman
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

RICKY A. WHITE,

Plaintiff,

-vs-

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and Severally,

Defendants.

_____/

93-307261
NO 3/11/93
JDG: SUSAN D. BORMAN
WHITE RICKY A
VS
TAYLOR CITY OF

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Attorney for Plaintiff
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John H. Dise, Jr. P27266
Gina U. Puzzuoli P37992
Attorneys for Defendants
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_____/

ORDER GRANTING DIRECTED VERDICT
TO CORPORAL RONALD HARMON ON
ALL OF PLAINTIFF'S CLAIMS

At a session of Court held in the Courthouse, in Wayne County, Michigan

on FEB 10 1994
MICHAEL L. STACEY

PRESENT: HONORABLE HON. SUSAN D. BORMAN
CIRCUIT COURT JUDGE

A Motion for Directed Verdict on behalf of Corporal Ronald Harmon having been made at the end of Plaintiff's proofs on January 25, 1994, and the court having heard all the evidence in the trial of the same;

IT IS ORDERED: That Corporal Ronald Harmon's Directed Verdict is granted on Plaintiff's claims of Assault and Battery, Gross Negligence and a violation of rights under the Michigan Constitution and the case against Corporal Ronald Harmon is dismissed.

MICHAEL L. STACEY
CIRCUIT COURT JUDGE

Judge HON. SUSAN D. BORMAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

RICKY A. WHITE,

Plaintiff,

-vs-

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and Severally,

Defendants.

_____/

93-307261
NO 3/11/93
JDG: SUSAN D. BORMAN
WHITE RICKY A
VS
TAYLOR CITY OF

Amos E. Williams P39118
Attorney for Plaintiff
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John H. Dise, Jr. P27266
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3600 Cadillac Tower
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_____/

ORDER GRANTING PARTIAL DIRECTED VERDICT TO CORPORAL RONALD CLEWETT

At a session of Court held in the Courthouse, in Wayne County, Michigan

on FEB 10 1994

MICHAEL L. STACEY
Alternate acting for Judge

PRESENT: HONORABLE HON. SUSAN D. BORMAN
CIRCUIT COURT JUDGE

A Motion for Directed Verdict on behalf of Corporal Ronald Clewett having been made at the end of Plaintiff's proofs on January 25, 1994, and the court having heard all the evidence in the trial of the same;

IT IS ORDERED: That Corporal Ronald Clewett's Directed Verdict is granted as to Plaintiff's claims of Assault and Battery and this claim is dismissed.

MICHAEL L. STACEY
CIRCUIT COURT JUDGE

Alternate acting for Judge
HON. SUSAN D. BORMAN

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

RICKY A. WHITE,

Plaintiff,

-vs-

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and Severally,

Defendants.
_____/

93-307261
NO 3/11/93
JDG: SUSAN D. BORMAN
WHITE RICKY A
VS
TAYLOR CITY OF

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_____/

JUDGMENT FOR CORPORAL RONALD CLEWETT

At a session of Court held in the Courthouse, in Wayne County, Michigan,

on FEB 10 1994

MICHAEL L. STACEY
Alternate acting for Judge

PRESENT: HONORABLE HON. SUSAN D. BORMAN
CIRCUIT COURT JUDGE

This above matter having been tried before a jury of eight and a unanimous verdict having been reached on January 26, 1994, of no cause of action in favor of Defendant Corporal Ronald Clewett on Plaintiff's claims of Gross Negligence and a violation of the Michigan Constitution;

JUDGMENT IS ENTERED IN FAVOR OF Defendant Ronald Clewett.

MICHAEL L. STACEY
CIRCUIT COURT JUDGE

Alternate acting for Judge
HON. SUSAN D. BORMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

-vs-

CITY OF TAYLOR, a municipal corporation, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, Jointly and Severally,

Defendants.

_____/

CA: 93-CV71937 DT

HON: PAUL V. GADOLA

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_____/

PROOF OF SERVICE

MICHELLE D. IRICK, being duly sworn deposes and says that on the 17th day of February, 1994 she served a copy of

SUPPLEMENT TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT OF COUNSEL

on Amos E. Williams, 2701 Cadillac Tower,
Detroit, Michigan 48226

by placing a copy of said document(s) in an envelope correctly addressed to said addressee(s) and placing same in the United States Mails with proper postage affixed thereon.

/s/ Michelle D. Irick
MICHELLE D. IRICK

Subscribed and sworn to before me
this 17th day of February, 1994.

/s/ Sheila Harrison
SHEILA HARRISON
Notary Public, Wayne County, MI
My Commission Expires 11/17/97